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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 47

SALVATORE FALCONE AND JOSEPH FALCONE,
Petitioners,

vs.

HAROLD E. BARNES, OFFICER IN CHARGE OF IMMIGRATION AND NATURALIZATION SERVICE,

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

GEORGE MORRIS FAY,
FAY & ANDERSON,
912 Washington Building,
Washington, D. C.,
Counsel for Petitioners.

JOHN P. BURKE,
Washington, D. C.,
Of Counsel for Petitioners.

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Matters Involved

Petitioners wish to reply to these aspects of the respondent's argument:

First. The nature of the cases cited by the respondent as authority for enforcing the subpoena. Petitioners contend they are inapplicable as precedent because they deal with utterly different areas of activity and privacy.

Second. The respondent's contention that there are no adversary parties in the administrative investigation. Peti-

tioners say the precise charge and adversary party were determined by and known to the agency but withheld from them.

Argument

I

The respondent's cases for strengthening the administrative subpoena power involve almost uniformly a corporate party resisting the subpoena. The few that involve individual parties called for production of personal business records which merit less protection than testimony. The wide visitorial powers possessed over corporations rob most of these cases of value as precedent. See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 204-205 where the court noted: ". . . it long has been established that Congress may exercise wide investigative power over them (corporations) analogous to the visitorial power of the incorporating state, when their activities take place within or affect interstate commerce correspondingly it has been settled that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters." Utterly different is the typical naturalized citizen, rarely alert to the fullness of his rights and ordinarily submissive to show of authority.

The area of investigation involved in such cases is entirely economic activity and the government's role that of a continuing regulatory nature. The validity of the subpoena power varies depending on the proper balance between the private and public interest. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 303. The commission of a fraud at some past time is no vital factor in the welfare of the country. If the naturalized citizen is a present menace, it is most likely that he is committing crimes, subversive or otherwise, for which he can immediately be detained and

punished. No vital public interest requires that an accomplished fraud be pursued otherwise than by normal civil or criminal proceedings commenced on the basis of conventional investigation.

Account must be taken that economic activity and records thereof is an "area of privacy" materially different from the personal status involved in denaturalization. See *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 202: "The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority."

Respondent's authorities are concerned with administrative subpoena powers to which has been attached immunity from prosecution for compulsory testimony. How completely this is true is shown by enumeration in *Shapiro* v. *United States*, 335 U.S. 1, 6-7. Thus before the citizen is led to compromise himself he is rewarded by a pledge of personal safety. No immunity provisions are attached to the Act here involved. In the nature of the subject matter a satisfactory immunity is impossible to achieve, as freedom from criminal prosecution is a paltry consolation if the testimony establishes a basis for lifelong exile. This difficult alternative is avoided if the statute is read to exclude the powers claimed by respondent.

Furthermore, respondent's authorities are concerned almost entirely with production of records. Insofar as the subpoena here required records, petitioners complied. Oral testimony is accorded a higher value and may be protected where records are not. See *Shapiro* v. *United States*, 335 U. S. 1, 27: "Of course all *oral* testimony by individuals can properly be compelled only by exchange of immunity for waiver of privilege."

II

The respondent blandly asks the Court to assume that there are no parties, as such, to these proceedings, and that therefore no distinctions can be made as to the nominee of an administrative subpoena. This contention seems little more than a polite spoof. The Immigration Officer's affidavit for enforcement alleged petitioners' naturalization was under investigation, the District Court's opinion observed that such an object was frankly stated, and the respondent in this Court states the question to be whether the subpoena may run to the naturalized citizen who is the subject of inquiry. While the government wishes to obtain complete disclosure from the citizen it refuses to concede this is adversary action lest the requirements of notice and opportunity to defend be applied to the most devastating phase of the contest, as they would be if the discovery process were under the judicial supervision of a Sec. 340 proceeding.

Contrasting with this perfect awareness by the Government of the real object and subject of the inquiry is its refusal of explanation to the citizen. The subpoena listed no charges or violation and explanation was flatly refused by the Immigration Officer. In the *Minker* case, the citizen was specifically notified by the District Court's enforcement order and in writing by the Immigration Officer that he was subpoenaed to give testimony in connection with revocation of his own naturalization. In the *Lansky* case (*Lansky* v. *Savoretti*, District Director, 5 Cir., 220 F. 2d 906) the opinion of the Circuit Court states that grounds for denaturalization is a "definite and single issue." No such precision of issue was communicated to petitioners prior to the District Court proceedings. While the issue has now apparently been resolved as a charge of fraud, the sufficiency of

notice is judged as of the time petitioners were summoned to testify. See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 27: "An investigation not based upon specified grounds is quite as objectionable as a search warrant not based upon specific statements of fact. Such an investigation, or such a search, is unlawful in its inception and cannot be made lawful by what it may bring, or what it actually succeeds in bringing, to light."

Self-restraint is a characteristic of responsible administrative procedure. Where the real objective of an investigation is clear to the agency and involves possible prosecution, civilized standards call for abstention from compulsory process. Thus compare policy directives of the Internal Revenue Service that process will not be sought to compel testimony from persons the subject of possible criminal prosecution.[1] Similar self-restraint is called for on the part of an agency dealing with the status of a citizen.

Conclusion

Some of the most bitter memories in the struggle for human rights attach to times and practices which compelled a party to furnish proof for his own destruction. Looking backward, on the other hand, to a relatively recent period it is possible to recall rules of law which absolutely forbade

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[1] Internal Revenue Service practice is disclosed in the record in *Beard* v. *United States*, No. 73, October Term, 1955, brief for petitioner, page 9:

". . . Special Agent Kennedy testified at the trial in the District Court as follows (Transcript of Testimony page 681):

"Q. . . . Why didn't you subpoena the records, Mr. Kennedy?

"A. It is my belief personally, it is a matter of law, and it is the policy of the Internal Revenue Service, and it is contained in a directive in the manual of the Intelligence Unit, Internal Revenue Service, that you should never issue process to compel the production of records or the testimony of any individual against whom we contemplate the possibility of recommending criminal prosecution in the future; we would be forcing him to testify against himself and, therefore, anything we got from him would not be admissible against him."

that parties should testify or be called as witnesses. Now abandoned, such rules nevertheless possessed some virtue and their passing was observed with regret by able lawyers on humanitarian grounds. Looking abroad to other lands we can observe legal procedures which emphasize a duty in the citizen to accuse and convict himself. We rightly abhor such denials of human dignity. Absorption with the pursuit of proof has not blinded us entirely to concern for the manner in which it is obtained in criminal cases. Sympathy for the administrative process should not blind us to the illiberial consequences of an unlimited subpoena power in this area of personal status, and illiberal purposes ought not be attributed to Congress where an alternative reading is possible.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

GEORGE MORRIS FAY,
FAY & ANDERSON,
912 Washington Building,
Washington, D. C.,
Counsel for Petitioners.

JOHN P. BURKE,
Washington, D. C.,
Of Counsel for Petitioners.

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